

FEDERAL MAGISTRATES COURT OF AUSTRALIA

KALINOVIENTE v MINISTER FOR IMMIGRATION & ANOR [2011] FMCA 760

MIGRATION – Application to review decision of Migration Review Tribunal – where applicant attended hearing held to take evidence from others – where Tribunal ended the hearing upon deciding that the applicant was too ill to participate – whether Tribunal erred in failing to put documentary material to the applicant for comment in writing prior to decision – whether failure to afford the applicant natural justice.

Migration Act 1958 (Cth), ss.353, 357A, 359, 359A, 360, 362B
Migration Regulations 1994 (Cth), regs.1.15A, 1.25

Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs and Another (2004) 221 CLR 1; [2004] HCA 62

Applicant S296 of 2003 v Minister for Immigration and Multicultural Affairs [2006] FCA 1166

Minister for Immigration and Citizenship v SZIAI (2009) 83 ALJR 1123; [2009] HCA 39

AZAAD and Another v Minister for Immigration and Citizenship and Another (2010) 189 FCR 494; [2010] FCAFC 156

Khan v Minister for Immigration and Citizenship and Another (2011) 192 FCR 173; [2011] FCAFC 21

Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) 78 ALJR 992; [2004] HCA 32

NBMB and Another v Minister for Immigration and Citizenship and Another (2008) 100 ALD 118; [2008] FCA 149

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam (2003) 214 CLR 1; [2003] HCA 6

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs and Another (2006) 228 CLR 152; [2006] HCA 63

SZBYR v Minister for Immigration and Citizenship (2007) 81 ALJR 1190; [2007] HCA 26

SZOGP and Another v Minister for Immigration and Citizenship and Another (2010) 244 FLR 139; [2010] FMCA 704

Applicant: LIUDMILA KALINOVIENTE

First Respondent: MINISTER FOR IMMIGRATION &

CITIZENSHIP

Second Respondent: MIGRATION REVIEW TRIBUNAL

File Number: SYG 583 of 2011

Judgment of: Barnes FM

Hearing date: 13 July 2011

Last date of submissions: 2 August 2011

Delivered at: Sydney

Delivered on: 6 October 2011

REPRESENTATION

Counsel for the Applicant: Mr S Churches

Solicitors for the Applicant: Audix Legal

Counsel for the Respondents: Mr T Reilly

Solicitors for the Respondents: Sparke Helmore

ORDERS

(1) The application be dismissed.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY**

SYG 583 of 2011

LIUDMILA KALINOVIENE
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application for review of a decision of the Migration Review Tribunal made on 8 March 2011 affirming a decision of a delegate of the first respondent not to grant the applicant a Partner (Temporary) (Class UK) visa.
2. The applicant applied for a Partner visa on 20 March 2008. Her son was included in that application as a member of her family unit. He is not a party to the present proceedings.
3. On 17 August 2009 a delegate of the first respondent refused the application. The delegate recorded that Ms Kalinoviene and her sponsor married on 8 June 2002. On the next day she departed Australia without her husband. She later advised the Department that this was because her mother had suffered a heart attack in her home

country of Lithuania. As well as stating that she could not abandon her ill mother, Ms Kalinoviene also told the Department that she had opened a cosmetic shop and rented a flat in London, England. Ms Kalinoviene did not return to Australia for five and a half years. Her sponsor did not leave Australia to visit her in this time.

4. Ms Kalinoviene re-entered Australia on 31 December 2007 on a tourist visa. She applied for the Partner visa in March 2008.
5. The delegate had regard to a report from the Department about the result of a visit to an address in Bankstown which was the last notified address for the applicant and sponsor on 8 July 2008. The delegate found it “clear” that at that time “*the couple were not living together*”. After referring to other information the delegate concluded that he did “*not believe that the applicant and sponsor have a genuine and continuing relationship*”. The delegate found that they did “*not live together*” but lived separately and did not satisfy the definition of spouse in reg.1.15A of the *Migration Regulations 1994* (Cth). There was said to be no evidence to indicate any other way in which the applicant could meet the criteria for the class of visa in question. The application was refused.
6. The applicant sought review by the Tribunal on 31 August 2009. On 11 February 2010 she submitted documents relating to a claim she had been a victim of domestic violence, including an application for an apprehended domestic violence order against the sponsor and a copy of advice from a court advocacy service that on 11 February 2010 no interim orders had been made by Waverley Local Court and that the matter was adjourned to 25 May 2010 for hearing. She also submitted letters from a doctor and a counsellor who suggested that she was a victim of abuse by her husband, and from a psychologist suggesting that she had a “*Major Depressive Disorder*”.
7. On 5 March 2010 the Tribunal invited the applicant and her son to a hearing on 19 March 2010. On 12 March 2010 the applicant’s migration agent notified the Tribunal that the applicant was overseas visiting her mother and that she would remain overseas for “*a few months*”. The Tribunal agreed to a request to reschedule the hearing to a time that also suited the commitments of the migration agent and on

3 May 2010 invited the applicant and her son to a hearing on 18 June 2010.

8. In the meantime, on 29 April 2010 the applicant's migration agent wrote to the Tribunal addressing issues raised in the delegate's decision about the genuineness of the relationship between the applicant and the sponsor and her claims of domestic violence. The letter enclosed supporting documents as well as material relating to various medical conditions and medical tests for Ms Kalinoviene and her son. It foreshadowed the provision of the documents required to establish that Ms Kalinoviene had suffered family violence committed by the sponsor (an alternative way to meet the time of decision criteria for a partner visa).
9. On 3 May 2010 the applicant's representative sought a further postponement of the Tribunal hearing because of his commitments on Christmas Island and because further documentation was being prepared in support of the applicant's case. The Tribunal did not agree to this request for a further postponement of the hearing.
10. On 4 May 2010 the applicant's representative again sought a postponement, on the basis that the applicant's son (the secondary applicant) had been arrested and was in prison awaiting a bail application and that this had affected the applicant's "*state of health and emotional standing*" such that she felt "*her attendance at the mentioned hearing will not give justice to her efforts and claims*". The Tribunal advised that it would not reschedule the hearing scheduled for 18 June 2010, having regard to the earlier rescheduling and the fact the hearing was not for another six weeks.
11. On 10 June 2010 the applicant's representative provided the Tribunal with documentation (including statutory declarations) in support of a claim of family violence by the applicant's husband including a claim that she suffered from symptoms of Major Depressive Disorder. Ms Kalinoviene's general practitioner Dr Aristoff stated she had "*been diagnosed with acute anxiety state and panic disorder on several occasions*" and required "*long-term treatment for the ongoing post-traumatic stress disorder*". In a letter to Waverley Local Court a psychologist claimed that Ms Kalinoviene's current psychological condition (and chronic anxiety, depression and stress) "*prevent[ed] her*

from representing herself at court” and claimed “the severity of her current mental condition...may deteriorate” if she had to do so.

12. On 10 June 2010 the applicant’s representative provided a more recent letter from Dr Aristoff which stated that she had *“suffered a severe shock and rapid deterioration of her psychological and physical health especially after attending Waverley Court hearing”* on 25 May 2010. The doctor expressed the opinion that it was *“inappropriate”* that the applicant attend the Tribunal for *“at least 3 months on medical grounds in view of a real danger of exacerbating her medical conditions and annulling the benefits of her current ongoing treatment”*. Concern was expressed that *“severe stress [could] gravely aggravate her depression with suicidal ideation and para-suicidal behaviour”*.
13. The Tribunal rescheduled the hearing to 15 September 2010. The adviser provided a response to hearing invitation form indicating that Ms Kalinoviene would attend and that it was unknown whether her son would attend.
14. On 23 June 2010 the Tribunal wrote to the applicants under s.359A of the *Migration Act 1958* (Cth) inviting their comments or response to information, including the results of the 2008 Departmental home visit to the address the applicant had provided in her March 2008 visa application and the observations on that visit that there was limited women’s clothing or personal belongings at the premises and the conclusion of the officers that the sponsor appeared to be the sole occupier of the residence. The letter referred to the fact that the applicant had provided documents addressed to her at this address in connection with her visa application in March 2008 (including correspondence dated 1 February 2008) but that she had subsequently claimed in a written statement provided to the Tribunal in April 2010 that her personal belongings were not unpacked because she had only recently moved to the address in question before the July 2008 home visit and that she did not have time to settle in or clean the premises.
15. The Tribunal explained that this information may suggest that the applicant’s April 2010 explanation that she only recently moved to that address was *“not reliable”* and may in turn lead the Tribunal to find that at the time of application the applicant could not meet the requirements of cl.820.211 of Schedule 2 to the Migration Regulations.

The letter also explained that this clause required the applicant to meet the definition of “*spouse*” in reg.1.15A of the Migration Regulations and that the Tribunal had to be satisfied the applicant and the sponsor were in a genuine spousal relationship at the time of the application, prior to any claimed domestic/family violence.

16. In this letter the Tribunal also invited the applicant to provide further written information to support her claims that she and her sponsor were in a genuine spousal relationship at the time of the application under s.359 of the Act in order for it to assess whether the requirements of cl.820.211 were met. It set out the sort of evidence that could be provided and attached an information sheet about the matters to which it must have regard under reg.1.15A.
17. On 15 July 2010 the applicants responded to the ss.359 and 359A letter through their representative, addressing issues in relation to the applicant’s address and cohabitation with the sponsor and providing documents in support of the application and in relation to the requirements of reg.1.15A and the criterion in cl.820.211 and suggesting that the claim to the Tribunal reflected an “*unintentional*” translation error.
18. On 20 August 2010 the applicant’s adviser again requested a postponement of the hearing scheduled for 15 September 2010, due to what were said to be concerns about Ms Kalinoviene’s “*presence, appearance and state of health*”. A letter of 17 August 2010 from her general practitioner Dr Aristoff stated that the applicant’s “*psychological and physical health*” had rapidly deteriorated, that severe stress had aggravated her condition, that she had been admitted to hospital on several occasions and that she was “*undergoing psychological counselling and support through a Psychologist*”. She was said to suffer from an inability to “*relate to people in a normal way*” and from “*acute panic attacks with elements of social phobia disorder*”. It was said to be “*inappropriate*” for her to attend the Tribunal for “*at least 3 – 6 months on medical grounds in view of a real danger of exacerbating her medical conditions and annulling the benefits of her current ongoing treatment*”.
19. The Tribunal agreed to postpone the hearing. It wrote to applicants through their adviser on 10 September 2010 stating that a new hearing

date would be scheduled at a later date. The Tribunal referred to the fact that medical advice indicated that Ms Kalinoviene may not be in a position to attend a hearing “*for some time*” and asked whether she would consent to having the review application decided on the papers or, if not, whether she would be content to have the hearing conducted by way of telephone hearing so that she did not have to physically attend the Tribunal.

20. On 6 October 2010 the applicant’s representative advised that according to Dr Aristoff the applicant remained in a “*very precarious situation*” and that “*her current condition [wa]s not conducive to her attending [a hearing] in person*” or via telephone. A further letter from Dr Aristoff dated 13 September 2010 stated that she had “*continuous stress related complaints*” and “*had been treated for a severe depressive illness*”, had “*exhibited signs of social phobia*”, had “*episodes of situation aphonia and uncontrollable crying*” and was “*still undergoing intensive counselling and treatment*” for such conditions. Dr Aristoff expressed the view that the applicant was “*not fit to undergo a phone interview...for a period of 6 months*” and stated that she “*must achieve a substantial level of improvement before she [wa]s fit enough to face the stressful situation of an interview*”.
21. On 25 October 2010 the applicant’s adviser rang the Tribunal (according to a case note of that date) enquiring as to the situation in relation to the request for postponement of the hearing and was apparently advised by the Tribunal that the hearing had been indefinitely postponed and not yet rescheduled, but that he could expect a request for further information in relation to his client’s medical condition.
22. On 2 November 2010 the Tribunal requested that a Medical Officer of the Commonwealth (an MOC) provide an opinion regarding the applicant’s fitness to attend a hearing based on the medical information she had provided.
23. On 9 November 2010 the MOC, to whom copies of the medical evidence provided by the applicant had been provided, responded. In his response the MOC referred to the fact that Ms Kalinoviene suffered from “*Adjustment disorder with mixed Anxiety and Depression accompanied by frequent panic attacks*” and was “*currently*

undergoing treatment". He observed that her *"condition appears to be treatable and with appropriate medical intervention and management plan, her condition is expected to improve"*. However the MOC advised: *"Based on the medical information available, it is plausible that her condition be (sic) aggravated by attending the Tribunal. It is recommended that her condition is re-assessed in a few months"*.

24. A copy of this assessment was provided to the applicants by letter of 15 November 2010 in which the Tribunal advised that it intended to invite the applicants to a hearing in February 2011 which it would schedule in the absence of any new information from the applicant or her representative.
25. In the absence of any such further information, on 24 December 2010 the Tribunal wrote to the applicants referring to the history of postponements of the hearing, and advised of a new hearing date of 11 February 2011.
26. However on 25 January 2011 the applicant's adviser wrote to the Tribunal about what the adviser described as *"Continuing Compelling factor for further consideration on re-scheduling Hearing date due to illness"*. The adviser stated that it was *"clear and evident"* to him that Ms Kalinoviene's *"presence, appearance and state of health remain[ed] a concern"* and attached a medical report from Dr Aristoff of 24 January 2011 in the same terms as his letter of 13 September 2010, except that it described Ms Kalinoviene's complaints as *"continuous severe stress related complaints"* and added that she had *"developed episodes of seasonal allergy, that affected her skin and her voice"*. She was said to be *"still undergoing intensive counselling and treatment"*. The doctor again expressed the view that the applicant was *"not fit to undergo a phone interview"* by the Tribunal *"for a period of 6 months"* and that she *"must achieve a substantial level of improvement before she is fit enough to face the stressful situation of an interview"*. The adviser sought the Tribunal's *"understanding"* of Ms Kalinoviene's *"predicament"* and also explained that he would be interstate from 1 to 12 February 2011.
27. In addition, the Tribunal was provided with a copy of a report from Ms Ksendzovska a registered psychologist in relation to Ms Kalinoviene. While this report is dated 22 January 2010 it is

apparent from the content of the report that it was prepared in January 2011 by the psychologist who had provided treatment for Ms Kalinoviene for *“Adjustment Disorder with Mixed Anxiety and Depression accompanied by frequent panic attacks/PTSD”* on six occasions between April 2010 and January 2011. The report stated that Ms Kalinoviene presented *“with symptoms consistent with a current diagnosis of Adjustment Disorder with Mixed Anxiety and Depression as well as from PTSD as a result of severe past abuse”* and that her chronic anxiety and depression caused *“significant impairment in social, occupational and personal areas of her life”*. It was anticipated that further treatment would be *“necessary for an extended period of time”*. The report also stated that Ms Kalinoviene’s *“current mental state ha[d] deteriorated despite her receiving psychological therapy”* and emphasised that *“any type of stress in her life may result in serious suicidal attempts”*. The psychologist also expressed the view that Ms Kalinoviene was *“unfit to undergo a phone interview”* by the Tribunal and that her *“mental state must substantially improve before she [wa]s fit enough to face the stressful situation of the interview”*. The psychologist recommended that to minimise Ms Kalinoviene’s *“distress”* any such interview should *“be conducted face to face rather than via telephone”*. The letter concluded by anticipating that Ms Kalinoviene’s condition would require treatment by a psychiatrist and a psychologist for *“an extended period of time”*.

28. In addition, a January 2011 report was provided from Ms Meylakh, a psychologist/sexologist, who expressed the opinion that on the basis of Ms Kalinoviene’s condition, *“including persistent symptoms of increased arousal in stressful situation”*, she was *“not fit to participate in any court matter at this stage”*, that stressful situations *“may trigger anxiety and panic attack[s]”* and affect Ms Kalinoviene’s ability to understand English or Russian.
29. According to a Tribunal file note of 31 January 2011 a Tribunal officer contacted the applicant’s adviser on 31 January 2011 advising that the Tribunal member was out of the office and would not be able to consider the request for a further postponement until 7 February 2011, but that unless the Tribunal advised otherwise, he should consider that the hearing would proceed as scheduled.

30. On 8 February 2011 the Tribunal wrote to both the applicants stating that while it had considered the request for a further postponement it had decided not to postpone the hearing. However what was meant by this was explained as follows:

*The Tribunal has considered the submission dated 25 January 2011 containing medical evidence provided for Mrs Liudmila Kalinoviene (Mrs Kalinoviene) and requesting a further postponement of the hearing due to illness. **In light of Ms Kalinoviene's continued unfitness for participation in a hearing and with no prospect that her condition will improve in the foreseeable future**, and in the absence of any information that Mr Kalinovas Paulius (Mr Paulius) is unfit to attend the scheduled hearing, the Tribunal will proceed with the hearing scheduled for 11 February 2011.*

The Tribunal invites Mr Paulius to give evidence at hearing. If there are other witnesses who can give evidence relevant to the issues in this case, the Tribunal may take evidence at the hearing from those witnesses. If there are no witnesses, the Tribunal will have to determine the review on the basis of evidence available. (emphasis added)

31. According to the Tribunal reasons for decision, on 11 February 2011 Ms Kalinoviene (but not her son Mr Paulius) in fact attended the hearing to which the son had been invited. The Tribunal recorded that Ms Kalinoviene asked for the hearing to be adjourned because she was too ill to participate and said that she had an appointment to see her general practitioner that day. The Tribunal recorded that it told Ms Kalinoviene that it was not prepared to further adjourn the hearing. She showed the Tribunal the medication she was taking, which the Tribunal observed had been prescribed for her son. Ms Kalinoviene was recorded as saying that her son “*was on the same medication and was seriously ill with bladder cancer and a heart condition*”, that she had run out of her own prescription pills and so she had borrowed those of her son.
32. The Tribunal recorded that it put to Ms Kalinoviene that the issue was whether there had ever been a genuine spousal relationship with her sponsor and that she replied that there had been a relationship and she had been happy to be with her husband every day but that she could not concentrate to talk to the Tribunal about the relationship. When asked

when the marriage had taken place, Ms Kalinoviene said “*eight or nine years ago*”.

33. The Tribunal recorded that Ms Kalinoviene told it she could not remember the month in which the marriage took place and could not remember anything, it closed the hearing “*on the basis that it seemed that the applicant was unfit to give evidence*”.
34. In its findings and reasons the Tribunal recorded that the hearing was terminated because of Ms Kalinoviene’s “*unfitness to give evidence*” and that while her son might have been able to give evidence of the circumstances about his mother’s relationship with the sponsor, he did not attend the hearing.
35. On 3 March 2011 the Tribunal received a further letter from the applicant’s representative advising that the applicant had contacted him on 1 March 2011 to advise that she had had a heart attack and had been in St Vincent’s Hospital for the past few weeks, that she was under specialist attention and that she would remain there until she had fully recovered. The adviser suggested that one of the factors that had brought this about was Ms Kalinoviene’s brief attendance at the Tribunal hearing on 11 February 2011 when she was not in a condition to attend but did so. He advised that he would forward formal medical documentation from the hospital. The adviser stated that “[w]e look forward to your understanding and await your advice accordingly”. No further information was provided before the Tribunal (which did not respond to this letter) made its decision on 8 March 2011.

The Tribunal decision

36. The Tribunal set out in detail the claims and evidence before it and what had occurred during the review and at the hearing on 11 February 2011.
37. In its findings and reasons the Tribunal expressed “*considerable concern*” that, except to a limited extent on 11 February 2011, it had not been able to obtain the benefit of oral evidence from either applicant. It described the history of hearing postponements in response to medical evidence about the applicant’s capacity to give evidence due to the state of her health, the fact that the applicant did

not consent to the matter being decided on the papers and the divergent medical reports about her capacity to give evidence face to face.

38. The Tribunal found that the hearing on 11 February 2011 “*did not assist*” it as the applicant had “*presented as ill*”. It stated: “*the hearing should terminate because of the applicant’s unfitness to give evidence*”. It observed that while the son might have been able to give evidence about the circumstances of his mother’s relationship with the sponsor he did not attend the hearing.
39. The Tribunal recorded that having regard to its duty to deal with reviews in a “*fair, just, economical, informal and quick*” manner (see s.353 of the Migration Act) and the history of the rescheduled hearings and the reasons for them, it had determined that “*the review in the present matter must take place without the benefit of further oral evidence from the applicant*”. The Tribunal referred to *Applicant S296 of 2003 v Minister for Immigration and Multicultural Affairs* [2006] FCA 1166 at [6] per Gyles J and *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992; [2004] HCA 32 at [45] per Gummow and Hayne JJ.
40. In relation to the son (the secondary applicant) the Tribunal decided that having regard to his non-attendance at the hearing of 11 February 2011 and in the absence of any explanation for his failure to attend, it should exercise its discretion under s.362B of the Act to make a decision without taking further action to allow or enable him to appear before it.
41. For reasons which it gave the Tribunal was not satisfied on the material before it that at the time of the application the applicant was the spouse of the sponsor within the meaning of reg.1.15A of the Migration Regulations as required by cl.820.211(2) of Schedule 2 to the Migration Regulations. As the time of application criteria were not satisfied the Tribunal found it unnecessary to consider whether the evidence of family violence satisfied the requirements of reg.1.25 or whether the family violence exception to the requirement that at the time of the decision the parties continued to be in a spousal relationship was applicable (cl.820.221).

42. The Tribunal found that the applicant and the sponsor met in January 2002 and married in Australia on 8 June 2002, that the applicant left Australia on her own for her home country the day after the wedding and that she did not return until 31 December 2007, during which period she and her husband remained apart. It recorded that the applicant had given differing reasons for her departure in her spouse visa application and in the written statement supplied in support of that application. It also had regard to the fact that when the applicant returned to Australia with her son it was on a visitor visa and that she had said in her written statement that she had made an unsuccessful application from Poland in 2002 for a spouse visa. There were no details before the Tribunal concerning such an application. While the Tribunal took into account that an earlier failed application for a spouse visa may have influenced why the applicant chose to return to Australia on a visitor visa, it found that the more likely explanation was that the circumstances of her relationship with her sponsor were such that at that time she would not have been able to satisfy the genuine relationship requirements for a spousal visa of an ongoing relationship for this five and a half year period (based only on the applicant's written claims).
43. The Tribunal had regard to the limited evidence of telephone conversations with the sponsor and 12 emails between July 2002 and May 2005 and stated that: *"Far from providing support for the claim of a genuine spousal relationship at time of application the emails tend to contradict the existence of any such relationship because"* they did not use the name said to be the husband's preferred name used by the applicant. The Tribunal found that the applicant's written statement in support of her visa application was *"also not suggestive of an ongoing relationship"* insofar as she stated that she *"decided to come to Australia and try to re-establish our relationship or at least part as friends"*.
44. The Tribunal referred to the fact that the visa application was made on 20 March 2008, a little less than three months after the applicant's return to Australia. It found that none of the evidence before it satisfied it that a genuine and continuing relationship came into existence in that period. It had regard to the fact that on the evidence of her adviser the applicant had been living with the sponsor only two

months before the application was made, that many of the documents provided related to a period after the date of the visa application and that others were of little weight. It gave little weight to supporting statutory declarations having regard to their content, their reliance on knowledge of the relationship before the 2002 marriage and the fact that all these declarations post-dated the 2008 Bankstown home visit by Departmental officers suggesting strongly that they were sought to counteract adverse conclusions that might have been drawn from that visit.

45. The Tribunal found that at the date of application the applicant and sponsor were living together for less than six months and did not have the benefit of reg.1.15A(5). In any event it found that the evidence did not satisfy it that a genuine and continuing relationship was in existence at the time of the visa application. It had regard to conflicting evidence in relation to the applicant's residence at the Bankstown address as follows:

... The applicant gave conflicting evidence about her residing at ...Bankstown. The lease...for these premises is in the name of the sponsor alone and the lease term is expressed to have commenced on 6 December 2007 (which is of course before the applicants arrived in Australia). As was pointed out by the Tribunal in its letter to the applicants under s.359A and s.359 of the Act, at the time the visa application was lodged with the Department (20 March 2008), various documents addressed to the applicant at this address were also lodged indicating that the applicant was living there before the application was made. Yet, when the DIAC officers visited on 8 July 2008, there was little evidence of the applicants' residing there. In a subsequent written statement made by the applicant after this visit she gave the explanation that her personal belongings were not unpacked because she had only recently moved to the address. The applicant's representative in his response to the Tribunal's letter said that the reason why there was little evidence of the applicants' clothing, etc, at the premises at the time of the visit was not because she had just moved in but because she was in the process of moving out. The letter said that what the applicant had said in her earlier statement about her just having moved into the premises was "an error of translation".

While the Tribunal does not accept that this was an error of translation, it notes that the applicant's later explanation is

supported by what the sponsor apparently told the Department officers at the time of the visit, "Sponsor claims all clothing packed due to possible move" (see para.27 above).

Whatever the truth of this matter, the Tribunal is not satisfied that there was a genuine and continuing relationship at time of application. It is possible for the existence of a genuine and continuing relationship at time of application to be inferred from evidence that arises at a later time. However, as mentioned above, the Tribunal is unable to give weight to the club membership cards, the various statutory declarations and other material that have been supplied as evidence of the necessary relationship at time of application.

46. The Tribunal addressed the limited evidence about financial aspects of the relationship at the time of the application and other matters referred to in reg.1.15A(3) of the Migration Regulations. It found that the relevant lease was in the name of the sponsor alone and that there was little evidence of pooled financial resources, except for a couple of bank statements relating to a period after the date of the visa application; that there was little evidence as to the parties living arrangements at the relevant time or as to sharing the responsibility of housework; that it gave little weight to photographs of the applicant and the sponsor in social settings, some of which post-dated the visa application, and little weight to statutory declarations of friends and acquaintances for the reasons given. It also found that there was "*significantly*" no statement by the sponsor at the time of his sponsorship of the visa application such as might reveal his commitment to the relationship and that while the applicant said in her evidence that she was "*committed to the relationship*", given the short period that the parties were together following the five and a half years they spent apart immediately after the wedding, the Tribunal found it impossible to conclude that they had a mutual commitment to a shared life as husband and wife.
47. The Tribunal was not satisfied on the evidence before it that at the time of the visa application the applicant and sponsor had a mutual commitment to shared life as husband and wife to the exclusion of all others and that the relationship was genuine and continuing. It found that they did not meet the requirements of reg.1.15A for a married relationship and that as the applicant was not the sponsor's spouse or

de facto partner at the time of the visa application she did not satisfy cl.820.211(2) of Schedule 2 to the Migration Regulations. It found that none of the other subclauses of cl.820.211 were relevant to the applicant's circumstances. The Tribunal concluded that as the applicant could not meet cl.820.211 she could not be granted a Subclass 820 visa and that it followed that she did not meet the criteria for a Class BS visa which required the applicant to be the holder of a Subclass 820 visa.

48. The Tribunal stated that while it was “*of great concern*” to it that “*the letter from the applicant’s representative sent to it after the Tribunal hearing indicate[d] that the applicant ha[d] had a heart attack since the hearing*”, it had “*determined that it should not delay completion of the review any longer*”.

These proceedings

49. The applicant sought review by application filed in this court on 30 March 2011. There was one ground in the application which was that the Tribunal made a jurisdictional error by “*Closing the hearing on 11 February 2011 upon deciding that the Applicant was too ill to participate, but then continuing to make a decision in the matter without affording the Applicant natural justice*”.

50. The particulars to this ground were as follows:

The Tribunal used various documentary materials in coming to its decision. Even if the Applicant was too ill to attend the Tribunal for an oral hearing, the documentary material the basis of the Tribunal’s decision should have been provided to the Applicant for her to comment on.

51. It appeared from the oral submissions of counsel for the applicant at the hearing that the applicant also sought to claim that there had been a failure by the Tribunal to comply with s.359A of the Act (and possibly a failure to comply with s.360 of the Act). The applicant was given the opportunity to file an amended application clarifying the basis for her contention of jurisdictional error and further submissions. However while an amended application was filed on 20 July 2011 it contains only the ground (in the same terms) as the ground in the application.

Despite this, in an amended outline of submissions it was contended that the Tribunal made a jurisdictional error by failing “*to supply necessary natural justice*” and also by failing “*to give the Applicant particulars of information as required by s 359A of the Migration Act*”. While neither the application nor the amended application makes any reference to s.359A, I have considered the claim that the Tribunal failed to comply with s.359A of the Act as an aspect of the claimed failure to accord “*natural justice*”.

Section 359A of the Migration Act

52. As indicated, there is nothing in the application or the amended application referring specifically to s.359A of the Act. It appears that from the particulars to the ground in the application and amended application and from the applicant’s submissions that reliance is placed on the fact the Tribunal “*used various documentary materials in coming to its decision*”. It was contended that “*the documentary material the basis of the Tribunal’s decision should have been provided to the Applicant for her to comment on*”. However in the applicant’s amended outline of submissions dated 19 July 2011 it appeared to be submitted that there was “*information*” which had to be put to the applicant under s.359A(1) of the Act which consisted of the differing reasons given by the applicant in her visa application and in her written statement or submission in support of her application for why she returned to Lithuania the day after her wedding.
53. Neither of these written statements constituted information which had to be put to the applicant under s.359A of the Act. Both statements fall within s.359A(4)(ba) as information that the applicant gave during the process that lead to the decision that was under review (other than such information that was provided orally by the applicant to the Department). The applicant did not provide any oral information to the Department.
54. Counsel for the applicant also claimed that these two statements raised contradictions (on the one hand a claim that the applicant returned to Lithuania to look after her son and then her mother became extremely sick and on the other a claim that she heard of her mother’s heart attack on her wedding day and had to go to Lithuania immediately). These

contradictions were said to go to the heart of the issue as to whether the decision of the delegate would be affirmed.

55. The applicant contended that, contrary to the position in *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190; [2007] HCA 26, the inconsistency that the Tribunal found in this evidence was “*at large prior to the hearing*” and was directly and obviously relevant to the issue to be resolved by the Tribunal as to whether there had been a “*real*” marriage on foot and the basis for the applicant returning to Lithuania at a critical moment in the marital relationship. It was submitted that whether her return was premeditated or as a result of unexpected bad news “*would be*” at least a part of the reason for affirming the delegate’s decision and that the basis for the applicant’s return to Lithuania was relevant in the same manner as a letter from a former employer was said to be information which fell within the s.359A obligation in *Khan v Minister for Immigration and Citizenship and Another* (2011) 192 FCR 173; [2011] FCAFC 21 at [44], [45], [82] and [87].
56. However the difference or inconsistency between the applicant’s two written statements about the reasons for or circumstances of her return to Lithuania does not constitute information within s.359A(1) of the Act. As stated in *SZBYR* in relation to s.424A(1) of the Act which is the equivalent provision in relation to the Refugee Review Tribunal at [18]: “*information...is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence*”. The fact that such an inconsistency was apparent prior to any Tribunal hearing and was relevant to the Tribunal decision does not provide a basis to distinguish the approach taken in *SZBYR* to the concept of “*information*” in a provision such as s.359A(1) of the Act.
57. Further, insofar as the applicant relied on an analogy between the internal inconsistency in her own evidence and the dob-in letter in *Khan*, the letter in *Khan* was plainly “*information*” from a third party containing factual allegations against the applicant. The issue in *Khan* was whether such information was “*the reason, or a part of the reason*” for the Tribunal’s decision, given that it was not explicitly mentioned by it. The facts in *Khan* do not assist the applicant. The applicant has

not identified “*information*” within s.359A(1) which was not put to her pursuant to s.359A of the Act.

58. The Tribunal is under no obligation to put its preliminary conclusions or thought process to the applicant (see *SZBYR* at [18]). As suggested in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs and Another* (2006) 228 CLR 152; [2006] HCA 63 (at [48]), “*Procedural fairness does not require the Tribunal to give the applicant a running commentary upon what it thinks*”. Moreover, the Tribunal had put to the applicant the particulars of the visit of the Departmental officers to the applicant’s sponsor’s home in its letter under s.359A of the Act dated 23 June 2010 (as well as other material that may in fact have been within the s.359A(4) exception).
59. Insofar as it was intended to be generally contended that the Tribunal was under an obligation to put the documentary material that the applicant had herself provided to the Department and/or the Tribunal pursuant to s.359A(1) of the Act, no such obligation arose. Such material was either information that the applicant gave during the process that led to the decision that was under review and hence within the exception to s.359A(1) in s.359A(4)(ba) or information that the applicant gave for the purposes of the application for review within s.359A(4)(b) of the Act. It has not established that there was any failure by the Tribunal to comply with s.359A(1) of the Migration Act.

The Tribunal’s obligation to invite an applicant to a hearing and natural justice

60. First, insofar as it was intended to be contended that the Tribunal had any general obligation to give information to an applicant for comment outside s.359A, for example deriving from common law procedural fairness obligations, s.357A(1) of the Act provides that Division 5 of Part 5 of the Act is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with. As is clear from *Khan* at [37] – [40], s.359A is in that context an exhaustive statement of the requirement of common law procedural fairness for the Tribunal to give information to an applicant in writing for comment.

61. The applicant suggested that there was an obligation on the Tribunal (apart from under s.359A) in the particular circumstances of this case to put to her information such as inconsistent information given in writing by her; the absence of an explanation from her about documentary evidence associated with the address visited by Departmental officers; the Tribunal's attitude to the explanation given by her through her adviser for her confusion over her living arrangements in mid-2008; the Tribunal's concerns about the existence of a non-genuine spousal relationship, in particular that she had not been living at the Bankstown address and hence that she was not living with her sponsor; and its concerns about her return to Lithuania in order to afford her procedural fairness.
62. I have considered the issues raised by the fact that the applicant was found by the Tribunal to be too ill to participate in the hearing and whether any obligation to put information or issues to her in writing arose in that context as a matter of procedural fairness. Insofar as there may be cases in which such an obligation may arise (see the discussion in *SZOGP and Another v Minister for Immigration and Citizenship and Another* (2010) 244 FLR 139; [2010] FMCA 704) it has not been established that this is such a case.
63. The ground in the application and the amended application takes issue with the fact that the Tribunal "*clos[ed]*" the hearing on 11 February 2011 on deciding that the applicant was too ill to participate and the fact that it then proceeded to make a decision in the matter "*without affording the Applicant natural justice*", which it was submitted would require it to provide "*documentary material the basis of [its] decision*" to her for comment.
64. No issue was taken in the application or amended application with the Tribunal's decision (as advised to the applicant in its letter of 8 February 2011) not to postpone the Tribunal hearing to give her a further opportunity to appear to give oral evidence and present arguments relating to the issues arising in relation to the decision under review. It is apparent from that letter that the Tribunal accepted that Ms Kalinoviene had a continued unfitness to participate in a hearing "*with no prospect that her condition will improve in the foreseeable future*". On that basis it invited her son, Mr Paulius, to give evidence

at the hearing scheduled for 11 February 2011 along with any other relevant witnesses.

65. Notwithstanding the limits of the ground as pleaded, in written submissions counsel for the applicant contended that the Tribunal had denied the applicant procedural fairness by refusal of what was said to be a “*reasonable request for adjournment of hearing*” as well as by the denial of what was said to be “*an opportunity to rebut adverse evidence*”.
66. First, if it is intended to be contended that the Tribunal was under an obligation to refer the matter back to the MOC for reassessment, it has not been established that the Tribunal was under such obligation. It did not undertake to refer the applicant to be reassessed by the MOC and nor was it asked to do so. This is not a case in which it can be said that it failed to make an inquiry about a critical fact, the existence of which was easily ascertained in the sense considered in *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123; [2009] HCA 39. The Tribunal accepted the applicant’s own medical evidence about her unfitness to participate in a hearing.
67. It appears that it is intended to be contended that the Tribunal fell into jurisdictional error in not acceding to the hearing adjournment request made by the applicant’s adviser in writing on 25 January 2011 or the applicant’s oral application for an adjournment made on 11 February 2011. What is in issue is whether it was open to the Tribunal to proceed to make a decision in such circumstances without later hearing from or further putting material to Ms Kalinoviene (beyond what had already occurred prior to and on 11 February 2011).
68. In relation to the adviser’s application for an adjournment dated 25 January 2011, it was in response to that application and the supporting medical documentation that the Tribunal wrote to the applicants on 8 February 2011 accepting, consistent with the medical evidence that the applicant had provided, that Ms Kalinoviene had a continued unfitness for participation in a hearing with no prospect that her condition would improve in the foreseeable future. In that context, it was clear that while it had decided not to postpone the hearing, as stated in that letter the hearing invitation was an invitation for her son Mr Paulius (who was the secondary applicant) and for any other

witnesses to give relevant evidence. As the Tribunal advised, if there were no witnesses, it would have to determine the review on the basis of the evidence that was available. In other words, the Tribunal indicated that it had decided to make a decision in relation to Ms Kalinoviene without affording her a further postponement to enable her to attend a Tribunal hearing at a later date, but subject to any oral evidence from any other witnesses on 11 February 2011. It did so in a context in which it had advised the applicants through their adviser that it had formed the view that Ms Kalinoviene was unfit to give evidence.

69. When Ms Kalinoviene appeared at the hearing on 11 February 2011 the Tribunal afforded her an opportunity to participate (notwithstanding its earlier acceptance of her adviser's claims and the evidence about her medical condition). It was open to the Tribunal in that context to take the view that it should not further adjourn the hearing and to decide not to continue with the hearing in relation to Ms Kalinoviene on the basis that (as it had already accepted and as her response on 11 February 2011 confirmed was a on-going issue) she was unfit to give evidence at a hearing with no prospect of improvement in the foreseeable future.
70. In *Applicant S296 of 2003* the applicant's adviser had asked the Tribunal to postpone a hearing for three months, after two earlier postponements, in view of the applicant's psychiatric difficulties in order that the applicant's psychiatric position could be better assessed. The adviser subsequently suggested that if there was a reasonable prospect of improvement in the applicant's condition in the next few months, then it was consistent with the Migration Act that the applicant be given an opportunity to appear at a hearing within such a reasonable time (at [2]). However the Tribunal proceeded to make a decision.
71. Gyles J held in that case that the fact that the Tribunal proceeded to make a decision without hearing from the applicant "*was an unreasonable refusal of an opportunity to present a case sufficient to breach the rules of natural justice or procedural fairness*" (at [5]). Having regard to the wider context (including the fact that the application for review had been on foot for some considerable time and that it was accepted that the applicant had genuine psychiatric problems), his Honour found that in the particular circumstances of the case there had to be at least another opportunity for the applicant to put

forward or to seek to put forward material in person. In addition, while the Tribunal had made it clear that it could not find for the applicant on the basis of the written material and that the appearance of the applicant would be essential to change its mind, there were some indications of fluctuation in the psychiatric condition of the applicant.

72. However, his Honour noted in *Applicant S296 of 2003* at [6] that “*There will be circumstances where the incapacity of the applicant is such that the review by the Tribunal simply must take place without the benefit of oral evidence or oral contribution from that applicant*”. This is such a case. As in *SZOGP*, in this case the Tribunal had, as advised in its letter of 8 February 2011, accepted not only that Ms Kalinoviene had a continued unfitness for participation in a hearing, but also that there was no prospect that her condition would improve in the foreseeable future (and see *Applicant S296 of 2003* at [2]). Insofar as the applicant’s amended outline of submissions appears to assume that the applicant’s condition was such that it could improve in a reasonably short period, the evidence before the Tribunal from the applicant was such that it was open to it to form the view that there was no prospect of improvement in the foreseeable future.
73. The Tribunal had already postponed the hearing a number of times in light of Ms Kalinoviene’s condition over a lengthy period of time. No issue was taken by the applicant or the applicant’s adviser with the Tribunal’s view in its letter of 8 February 2011 that there was no prospect that her condition would improve in the foreseeable future. As in *SZOGP* there was medical evidence that the applicant was unfit to give evidence.
74. The issue that arose in *SZOGP* was whether the Migration Act (in that case Part 7, the equivalent of Part 5 in relation to protection visa applications) gave the Refugee Review Tribunal power to complete its review rather than indefinitely postponing its decision to see whether the applicant’s condition might improve enough for her to give oral evidence to the Tribunal. Smith FM also considered whether the Tribunal had failed to accord the applicant procedural fairness in deciding to make a decision in the absence of oral evidence from her at a hearing or failed to sufficiently warn her that this might be the

consequence of her tendering evidence of chronic unfitness to attend a hearing.

75. Smith FM concluded that the Refugee Review Tribunal had sufficiently complied with its obligation to invite the applicant to a hearing and that it had power to proceed to make a decision without appointing a rescheduled hearing once it was satisfied that she would be unfit to attend for the foreseeable future. His Honour found that there was no breach of procedural fairness or other jurisdictional error in such circumstances, having regard to the dictum of Gyles J in *Applicant S296 of 2003* at [6] that:

There will be circumstances where the incapacity of an applicant is such that the review by the Tribunal simply must take place without the benefit of oral evidence or oral contribution from that applicant.

76. Similarly, the Migration Review Tribunal has such a power. In this case the Tribunal complied with its formal obligation to invite the applicant to a hearing pursuant to s.360 of the Act. It had before it substantial medical evidence from the applicant (as well as the MOC report), including January 2011 evidence about Ms Kalinoviene's deterioration, her ongoing condition, need for treatment and her unfitness to participate in a Tribunal hearing. It had sufficiently complied with its obligation to invite the application to a hearing.
77. In fact the applicant initially attended the hearing scheduled for 11 February 2011. The Tribunal clearly did not expect her to attend, as it was an invitation extended to her son. The Tribunal's refusal of the applicant's oral request for an adjournment to allow her an opportunity to participate at some future time in circumstances where it had accepted that she would not be fit to attend a hearing at any time in the foreseeable future and where it was of the view she was unfit on 11 February 2011 does not amount to a denial of procedural fairness. It had power to proceed to make a decision without rescheduling a hearing in such circumstances. It was open to the Tribunal to find on evidence before it that the incapacity of Ms Kalinoviene was such that the review must take place without the benefit of further oral evidence from her (*Applicant S296 of 2003* at [63]).

78. The Tribunal was not obliged to postpone completion of its review for so long as Ms Kalinoviene was unfit to participate in a hearing (*SZOGP* at [48]). Counsel for the applicant did not take issue with the reasoning of Smith FM in *SZOGP* and I consider that I should follow it in the interests of judicial comity as I am not persuaded that it is clearly wrong. Indeed I agree with Smith FM.
79. I am satisfied that the Tribunal had the power to proceed to make a decision notwithstanding the unfitness of Ms Kalinoviene to attend a hearing and that no procedural unfairness has been established in its decision to proceed to make a decision without appointing a rescheduled hearing to take oral evidence from Ms Kalinoviene insofar as such obligations arise in the context of the Migration Act (see *SZOGP* at [57]). As in *SZOGP*, at all times Ms Kalinoviene was assisted by a migration agent. There was no evidence of or submission to the Tribunal that the applicant's health problems were of an acute nature or were fluctuating or likely to improve in the near future such as to render her fit to attend a rescheduled hearing. Indeed the evidence was to the contrary (cf *Applicant S296 of 2003*). The Tribunal informed the applicants and its adviser of its view of the evidence about Ms Kalinoviene in its letter of 8 February 2011. It did not receive any evidence or submission to the contrary. After the hearing the applicant's representative advised the Tribunal that the applicant had a heart attack, but did not indicate that she would be fit to attend a hearing at any time in the foreseeable future.
80. Moreover, it was the applicant through her adviser, not the Tribunal, who raised the issue of her capacity to enjoy the right to be invited to a hearing under s.360 of the Act and who had sought a postponement of the hearing on an indefinite basis (see *SZOGP* at [58]).
81. The Tribunal had previously enquired whether the applicant would agree to the hearing being conducted by way of telephone hearing, but was advised by her adviser that her current condition was not conducive to her attending in person or being interviewed by telephone. The Tribunal informed the applicant in its letter of 8 February 2011 that in effect it intended to make its decision having regard to any oral evidence that was provided by witnesses other than Ms Kalinoviene and otherwise on the material before it.

82. Moreover, and importantly, it did so in circumstances in which it had not only put to the applicant under s.359A of the Act matters for comment but had also invited her under s.359 to provide information to demonstrate that she met the definition of spouse in reg.1.15A of the Regulations and that she was in a genuine spousal relationship with the sponsor at the time of application. In its letter of 23 June 2010 the Tribunal set out matters relevant to the determination of whether the requirements of cl.820.211 were met to support the applicant's claims that she and her sponsor were in a genuine spousal relationship at the time of the application. It explained the relevance of this issue. It extended this invitation to the applicant after it had invited her to a hearing on the basis that it was not satisfied on the material before it of her claims. In other words, the applicant had the opportunity to give the Tribunal information in writing addressing the critical issue. Thereafter the Tribunal addressed the postponement applications, in each case advising that if Ms Kalinoviene failed to attend the scheduled hearing the Tribunal may make a decision without taking any further action to allow or enable her to appear before it. In these circumstances the fact that the Tribunal did not repeat its s.359A or s.359 invitations after 11 February 2011 does not establish a failure to afford Ms Kalinoviene natural justice.
83. When Ms Kalinoviene chose to attend the hearing on 11 February 2011 the Tribunal recorded that it gave her the opportunity to participate in the hearing. While it had to terminate the hearing, it did so in circumstances where it had formed the view that she was unfit to give evidence. This is not a case in which the Tribunal failed to accord an applicant procedural fairness at a hearing in the sense considered in *AZAAD and Another v Minister for Immigration and Citizenship and Another* (2010) 189 FCR 494; [2010] FCAFC 156. As submitted for the first respondent, the requirements of s.360 and the need for procedural fairness in the conduct of a hearing (see *SZBEL*) cannot be engaged at a hearing which effectively cannot proceed because the applicant is unfit.
84. There is no evidence that what occurred when Ms Kalinoviene appeared before the Tribunal on 11 February 2011 amounted to a failure to comply with s.360 (which was not in any event pleaded) or a failure to accord procedural fairness at the hearing. Rather, it was

apparent to the Tribunal that the hearing could not be conducted because of Ms Kalinoviene's unfitness. The fact that if the hearing had proceeded the Tribunal would have been obliged to raise matters that were determinative or dispositive issues as considered in *SZBEL* does not establish jurisdictional error. In fact, the Tribunal recorded that it did raise the dispositive issue of whether there had ever been a genuine spousal relationship between the applicant and her sponsor. It was, however, unable to proceed with the hearing because of the applicant's ongoing unfitness to participate in such a hearing. In any event, the applicant does not allege a breach of s.360(1) and has not led any evidence as to what occurred in the hearing. No breach of s.360(1) of the Act is pleaded and nor is any breach apparent in this respect.

85. The applicant was given the opportunity to put evidence before the Tribunal in writing. She has not put any evidence before the court showing that the procedures adopted by the Tribunal resulted in "*practical injustice*" in the sense considered in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* (2003) 214 CLR 1; [2003] HCA 6 at [37] – [38] or that an injustice must have occurred (see *SZOGP* at [58]). No failure to accord natural justice is established in the manner contended for in the amended application.

Other issues

86. Insofar as issue appears to be taken with the fact that the Tribunal offered the applicant's son the opportunity to participate at a hearing, this did not amount to an assumption that relevant evidence would "*necessarily*" be provided by the applicant's son. Rather, he was afforded such an opportunity as one of the applicants. Nor, contrary to any submission to that effect, is there evidence that the applicant's son was still in prison as at February 2011 (as advised to the Tribunal on 4 May 2010 when it was said that the applicant was in prison awaiting the result of a bail application) so that he was in no position to give evidence or organise witnesses. The Tribunal afforded the applicant's son the requisite opportunity to give evidence at a hearing. This does not amount to an assumption that he could provide evidence relevant to the issues to be determined by the Tribunal that ought to have been given by his mother such as to give rise to a jurisdictional error.

87. It was also contended generally that the applicant was denied the opportunity to rebut adverse evidence. The adverse evidence in question relates to matters arising out of the evidence the applicant had given in writing to the delegate and to the Tribunal. The Tribunal was not under an obligation to give the applicant an opportunity to “rebut” such evidence, beyond the obligations in the Migration Act which have not been shown to have been breached in a manner constituting jurisdictional error.
88. Moreover, the fact that Ms Kalinoviene did attend the hearing scheduled on 11 February 2011 (for the purposes of taking evidence from her son) is not such as to establish that the Tribunal was then somehow obliged to offer her a further hearing. The Tribunal had decided that there was no prospect that her condition would improve in the foreseeable future. Such a conclusion may in fact have been reinforced by what occurred at the Tribunal hearing. It was not overcome by evidence provided to the Tribunal by the adviser after the hearing. Indeed, to the extent that any adjournment was requested at the hearing, it appears to have been essentially for an indefinite period. It has not been established that it was unreasonable or procedurally unfair for the Tribunal not to accede to such a request having regard to the matters considered in *Applicant S296 of 2003* at [6], bearing in mind its obligation to act in a way that is among other things quick (see *NBMB and Another v Minister for Immigration and Citizenship and Another* (2008) 100 ALD 118; [2008] FCA 149 at [14] per Flick J) and in circumstances where it had not received any disagreement with its view that there was no prospect that the applicant’s condition would improve in the foreseeable future. Rather, after 11 February 2011 it was advised that the applicant had a heart attack. There was no indication that she would be fit to attend a hearing at any time in the foreseeable future. This is not a case in which the procedure adopted by the Tribunal demonstrates or reinforces an apprehension as to a lack of impartiality (cf *NBMB* at [14]).
89. If the Tribunal had not given the applicant the opportunity to provide it with information in writing addressing critical issues beyond information within s.359A of the Act, in particular and importantly, the dispositive issue of concern to it (that is whether there was a genuine spousal relationship with the sponsor at the time of the application), it

may have been that it would have in some way failed to accord her procedural fairness by not offering some alternative method to her to put information to it or to comment on matters of concern. However she had such an opportunity to address the critical issues of central relevance to the decision. The fact that the Tribunal afforded this opportunity to the applicant *before* its ultimate decision not to offer a further postponement of the hearing (but rather to make the decision on the basis that Ms Kalinoviene was unfit and there was no evidence that she would improve in the reasonably foreseeable future) is not such as to establish that it denied her procedural fairness or otherwise fell into jurisdictional error. The Tribunal did not foreclose the giving of evidence by an affected party. It brought its views to the attention of the applicant in its correspondence with her adviser, particularly by its letter of 8 February 2011. This is not a case in which the Tribunal must have “*thought that the arguments had been presented so inadequately that the review could not be completed until further steps had been directed and performed*” in the manner considered by McHugh, Gummow, Callinan and Heydon JJ in *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs and Another* (2004) 221 CLR 1; [2004] HCA 62 at [27].

90. Finally, insofar as the applicant appeared to contend that an effort ought to have been made by the Tribunal to set up a telephone hearing for the applicant, the Tribunal had made such an offer. It had been rejected by the applicant and her adviser on the basis of medical evidence. This rejection was clearly accepted by the Tribunal as a further indication of the applicant’s lack of fitness to participate in a hearing, whether by telephone or in person.
91. As no jurisdictional error has been established the application must be dismissed.

I certify that the preceding ninety-one (91) paragraphs are a true copy of the reasons for judgment of Barnes FM

Associate:

Date: 6 October 2011